SUPREME COURT OF INDIA

Shiv Cotex

Vs.

Tirgun Auto Plast P.Ltd.& Ors.

C.A.No.7532 of 2011

(Aftab Alam and R.M.Lodha,JJ.,)

30.08.2011

JUDGMENT

R.M. Lodha,J.,

SLP (Civil) No.30105 of 2010

1. Leave granted.

2. The purchaser, who was not party to the suit but impleaded as 2nd respondent in the first appeal and was arrayed as such in the second appeal, is the appellant being aggrieved by the judgment and order of the High Court of Punjab and Haryana whereby the Single Judge of that Court allowed the second appeal preferred by the plaintiff (1st respondent) and set aside the concurrent judgment and decree of the courts below and remanded the suit to the trial court for fresh disposal after giving the plaintiff an opportunity to lead evidence.

3. In the month of May, 1991, the 1st respondent M/s. Tirgun Auto Plast Private Limited - applied to the Punjab Financial Corporation (for short, `Corporation') for a term loan of Rs. 47.60 lac and special capital assistance (soft loan) of Rs. 4 lac. The term loan of Rs. 46 lac and soft loan of Rs. 4 lac was disbursed by the Corporation to the 1st respondent in the month of October, 1991 on execution of the mortgage deed. Vide this mortgage deed, the 1st respondent mortgaged its various assets in favour of the Corporation. On the 1st respondent's failure to pay the due amount along with interest, the Corporation on March 19, 1998 took over the mortgaged property comprising land, building and machinery in exercise of its power under Section 29 of the State Financial Corporations Act, 1951 (for short, `1951 Act').

4. The 1st respondent (hereinafter referred to as `plaintiff'), on February 17, 2001, filed a suit for declaration, mandatory injunction and other reliefs against the Corporation - 2nd respondent in the Court of Civil Judge (Junior Division), Chandigarh. Inter alia, the plaintiff prayed that the takeover of its assets and all subsequent sale proceedings by the Corporation be declared illegal, null and void and inoperative; the direction be issued to the Corporation to charge interest at the rate of 12.5 per cent per annum (prevailing rate) on the loan from the

date of commencement of production to the date of takeover and the Corporation be also directed to restore back the possession of the suit property to it.

5. The Corporation (sole defendant) in the suit traversed the plaintiff's claim and set up the plea that plaintiff could not pay the due amount under the loan despite repeated notices necessitating the action under Section 29 of the 1951 Act. The Corporation asserted that fair procedure was followed and no illegality was committed by it in proceeding under Section 29 of the 1951 Act. The Corporation also raised objections regarding the maintainability of the suit on the grounds of limitation and jurisdiction of the Civil Court.

6. The trial court having regard to the pleadings of the parties framed issues (six in all) on July 19, 2006. Issue no. 1 was to the following effect:

> "Whether impugned action of defendant is illegal and if it is proved, whether plaintiff is entitled for decree of declaration and mandatory injunction?"

The burden to prove the above issue was kept on the plaintiff.

7. Thereafter, the suit was fixed for the evidence of the plaintiff on November 1, 2006. However, no evidence was let in on that day. The matter was then adjourned for the evidence of the plaintiff on March 2, 2007. On that day also the plaintiff did not produce evidence and the matter was adjourned to May 10, 2007. On May 10, 2007 again plaintiff did not produce any evidence. The trial court was, thus, constrained to proceed under Order XVII Rule 3(a) of the Code of Civil Procedure, 1908 (for short, `CPC') and passed the following order :

> "Matter is fixed for conclusion of the plaintiff's evidence being last opportunity. No plaintiff's witness is present and neither any cogent reason has been put forth for such failure fully knowing the fact that today is the third effective opportunity for conclusion of plaintiff's evidence. Hence, matter is ordered to be proceeded under Order 17, Rule 3(a) C.P.C. and plaintiff's evidence is deemed to be closed. Heard. To come up after lunch for orders."

8. On May 10, 2007 itself in light of the above order, the trial court dismissed the suit in its post lunch session.

9. After dismissal of the suit, the Corporation sold the mortgaged property by auction to the appellant for Rs. 64.60 lac (Sixty four lac and sixty thousand only).

10. Against the judgment and decree of the trial court passed on May 10, 2007, the plaintiff preferred civil appeal in the court of Additional District Judge, Chandigarh. In the appeal, the plaintiff made an application on December 21, 2007 for impleadment of the appellant and its partners as respondent nos. 2 to 5. The application for impleadment was granted and the appellant and respondent nos. 3 to 5 herein were added as parties.

11. The Additional District Judge, Chandigarh after hearing the parties, dismissed the civil appeal on March 20, 2008.

12. Being not satisfied with the concurrent judgment and decree of the two courts below, the plaintiff preferred second appeal before the High Court which, as noticed above, has been allowed by the Single Judge on September 20, 2010 and the suit has been remanded to the trial court for fresh decision in accordance with law.

13. The judgment of the High Court is gravely flawed and cannot be sustained for more than one reason. In the first place, the High Court, while deciding the second appeal, failed to adhere to the necessary requirement of Section 100 CPC and interfered with the concurrent judgment and decree of the courts below without formulating any substantial question of law. The formulation of substantial question of law is a must before the second appeal is heard and finally disposed of by the High Court. This Court has reiterated and restated the legal position time out of number that formulation of substantial question of law is a condition precedent for entertaining and deciding a second appeal. Recently, in the case of *Umerkhan v. Bismillabi @ Babulal Shaikh and Ors*[1]. decided by us on July 28, 2011, it has been held that the judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating the substantial question of law. The legal position with regard to second appellate jurisdiction of the High Court was stated by us thus:

> "13. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position."

14. Unfortunately, the High Court failed to keep in view the constraints of second appeal and overlooked the requirement of the second appellate jurisdiction as provided in Section 100 CPC and that vitiates its decision.

15. Second, and equally important, the High Court upset the concurrent judgment and decree of the two courts on misplaced sympathy and non - existent justification. The High Court observed that the stakes in the suit being very high, the plaintiff should not be non-suited on the basis of no evidence. But, who is to be blamed for this lapse? It is the plaintiff alone. As a matter of fact, the trial court had given more than sufficient opportunity to the plaintiff to produce evidence in support of its case. As noticed above, after the issues were framed on July 19, 2006, on three occasions, the trial court fixed the matter for the plaintiff's evidence but on none of these dates any evidence was let in by it. What should the court do in such circumstances? Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be a silent spectator and leave control of the case to a party to the case who has decided not to take the case forward? It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the judges are little pro-active and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realize that adjournments do dent the efficacy of judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained. When we say `justifiable cause' what we mean to say is, a cause which is not only `sufficient cause' as contemplated in sub-rule (1) of Order XVII CPC but a cause which makes the request for adjournment by a party during the hearing of the suit beyond three adjournments unavoidable and sort of a compelling necessity like sudden illness of the litigant or the witness or the lawyer; death in the family of any one of them; natural calamity like floods, earthquake, etc. in the area where any of these persons reside; an accident involving the litigant or the witness or the lawyer on way to the court and such like cause. The list is only illustrative and not exhaustive. However, the absence of the lawyer or his non-availability because of professional work in other court or elsewhere or on the ground of strike call or the change of a lawyer or the continuous illness of the lawyer (the party whom he represents must then make alternative arrangement well in advance) or similar grounds will not justify more than three adjournments to a party during the hearing of the suit. The past conduct of a party in the conduct of the proceedings is an important circumstance which the courts must keep in view

whenever a request for adjournment is made. A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit - whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril. Insofar as present case is concerned, if the stakes were high, the plaintiff ought to have been more serious and vigilant in prosecuting the suit and producing its evidence. If despite three opportunities, no evidence was let in by the plaintiff, in our view, it deserved no sympathy in second appeal in exercise of power under Section 100 CPC. We find no justification at all for the High Court in upsetting the concurrent judgment of the courts below. The High Court was clearly in error in giving the plaintiff an opportunity to produce evidence when no justification for that course existed.

17. In the result, the appeal is allowed and judgment and order of the High Court passed on September 20, 2010 is set aside.

18. There shall be no order as to costs.

Judgment Referred.

[1]*C.A.No.6034 of 2011*